1963

Contracts and Sales

Douglass Boshkoff
Indiana University Maurer School of Law

CONTRACTS AND SALES

DOUGLASS G. BOSHKOFF†

THE current article on contracts also contains a few cases on products liability, which ordinarily would be discussed in a separate article on sales. This year the two articles have been combined because of the close relation between the cases. As in the past, only cases of more than routine interest have been discussed in the text. All others have been consigned to oblivion in the accompanying footnote.[1]

I

FORMATION OF CONTRACT

Offer and Acceptance. Enthusiastic but imprecise language on an application for insurance coupled with inadequate processing operations were responsible for the imposition of liability upon the insurer in *Gorham v. Peerless Life Ins., Co.*[2] The defendant sent plaintiff's decedent, William Waldo Gorham, an application for accident insurance accompanied by advertising which urged hasty action. Gorham completed the application and returned it with the first month's premium. The policy was issued by the defendant on December 19, 1959, eight days subsequent to an accident which had caused

† Associate Professor, Indiana University School of Law; Member of the Michigan and New York Bars.

1. Biagini v. Mocnik, 369 Mich. 657, 120 N.W.2d 827 (1963) (quantum meruit recovery permitted in absence of express contract); Birchcrest Bldg. Co. v. Plaskove, 369 Mich. 631, 120 N.W.2d 819 (1963) (reformation denied after review of facts); Fulton v. Kroger Co., 369 Mich. 539, 120 N.W.2d 232 (1963) (warranty action dismissed for failure to establish causation); Board of Rd. Comm'rs v. North Am. Dev. Co., 369 Mich. 229, 119 N.W.2d 593 (1963) (promise to third party constitutes consideration for contract); Gilbert v. Vogelheim, 369 Mich. 530, 120 N.W.2d 179 (1963) (parol evidence admissible to establish subject matter of sale); Goslin v. Goslin, 369 Mich. 372, 120 N.W.2d 242 (1963) (two memoranda sufficient to satisfy the Statute of Frauds); Carrier Corp. v. Central Station Air Conditioning Co., 367 Mich. 605, 116 N.W.2d 777 (1962) (contract construed to grant exclusive dealership); Ginger v. Zisman, 366 Mich. 697, 116 N.W.2d 56 (1962) (suretyship contract unenforceable because not in writing); W. J. Howard & Sons, Inc. v. Meyer, 367 Mich. 300, 116 N.W.2d 752 (1962) (use of practical construction by parties to explain ambiguous term in contract); Jonna v. Diversey Corp., 368 Mich. 231, 118 N.W.2d 471 (1962) (no ambiguity in contract); Kroninger v. Anast, 367 Mich. 478, 116 N.W.2d 863 (1962) (innocent misrepresentation by vendor of realty provided basis for rescission by vendee); Reinardy v. Bruzzese, 368 Mich. 688, 118 N.W.2d 952 (1962) (defendant has burden of proving that plaintiff failed to mitigate damages); Ridinger v. Ryskamp, 369 Mich. 15, 118 N.W.2d 689 (1962) (question as to whether option to purchase land could be exercised); Sickels v. Berliner, 368 Mich. 474, 118 N.W.2d 248 (1962) (factual dispute as to terms of contract).

2. 368 Mich. 335, 118 N.W.2d 306 (1962).

Gorham's death. Plaintiff's executor then brought this action to reform the policy so as to show an effective date prior to the date of death.

The trial court ordered a decree for plaintiff agreeing with his contention that the defendant had delayed an unreasonable amount of time in processing the application. This, coupled with the retention of the advance premium, was thought to imply acceptance. Defendant's feeble plea that it was busy and could not process the application more rapidly was characterized by the trial judge as "a matter of convenience" to the company and certainly no justification for its conduct.

Relying heavily upon its previous decision in *Wadsworth v. New York Life Ins. Co.*,[3] the Michigan Supreme Court in an opinion by Justice Kavanagh affirmed the action of the lower court. In the *Wadsworth* case a combat pilot applied for life insurance and paid the first premium. On the fourth of January, the policy was issued, and although received by the agent on January 24, it was not delivered to the insured because the agent supposedly had another form for the insured to sign. Until the insured's death a little over three months later, the company not only continued to correspond with the insured with no mention that the policy might not yet be effective but also received four subsequent monthly premium payments. Under these circumstances the court held that there was a jury question on the issue of unreasonable delay. The facts in the *Gorham* case do not make as strong a case for acceptance by silence. Here there was no subsequent dealing that might indicate satisfaction with the application and no collection of any premium other than the first installment. The period of silence after receipt of the completed application was only ten days[4] as compared with more than three months in *Wadsworth*. Evidently the Michigan Supreme Court is now willing to conclude that even a short delay in processing an application indicates that the policy has become effective. The standard by which the insurance company's action is now measured leaves little opportunity for leisurely processing.

As is customary in these cases, the insurance company relied on language that was supposed to prevent any obligation from arising until the policy was actually issued. As is also customary in these cases, the court refused to give effect to the language on the ground

3. 349 Mich. 240, 84 N.W.2d 513 (1957).

4. The application was first received by the insurer on November 16, 1959 but it was incomplete and the insurance company returned it to Gorham for further information. The properly completed application was received on December 1. Therefore, acceptance must have occurred in the interval between December 1 and December 11 when Gorham died.

that it was ambiguous at best. While it is possible to question the court's attitude toward ten days' silence, there can be no disagreement with its conclusion that the language did not give fair warning of the fact that the insurance might not be immediately effective. The language of the application and advertisement called attention only to the need for haste and not to the possibility of no protection prior to approval of the application.[5] Possibly a letter of acknowledgement calling attention to the prospective delay in processing might prevent recurrence of the result in the instant case. On the other hand, we may wonder if even such a letter could adequately explain to the applicant that the company was going to move in a leisurely fashion although it had urged him to proceed as rapidly as possible.

Consideration. In *Easley v. Mortensen*,[6] the plaintiffs claimed that the defendant had promised to see that premises subject to a mortgage foreclosure would not be lost through expiration of the statutory redemption period.[7] Evidently, refinancing, which never materialized, was contemplated. Plaintiffs' suit for damages[8] was dismissed after their counsel's opening statement on the theory that there was no consideration for the asserted promise. This was correct since the element of exchange was lacking. However, assuming that plaintiffs' claim of reliance in not securing refinancing could be proved, there appears to be no reason why promissory estoppel as defined in the Restatement of Contracts[9] should not provide a substitute for consideration.

---

5. The application stated:

SPECIAL OFFER!

Send only $1.00 for your first month's premium, during which time you will be completely insured. One application covers the whole family. If you decide to keep the policy you can then pay the monthly rate. . . .

There followed on the reverse side, this statement:

INTRODUCTORY OFFER

Only $1.00 covers the first month's introductory premium regardless of the number of persons on this application. After the first month you pay only the low rates below.

(368 Mich. at 338, 118 N.W.2d at 307.)

6. 370 Mich. 115, 121 N.W.2d 420 (1963).

7. Mich. Comp. Laws § 619.3 (1948), Mich. Stat. Ann. § 27.1113 (1962) (one year). This section was subsequently repealed by Mich. Pub. Acts 1961, No. 236.

8. One day prior to the expiration of the mortgage redemption period, defendants informed plaintiffs that they could not honor their promise. Plaintiffs managed to sell the property and sued to recover the difference between the fair market value and the price realized on a forced sale.

9. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts § 90 (1932).

Duress. By statute[10] in Michigan a taxpayer may pay, under protest, certain taxes and special assessments and then within thirty days sue to recover the accounts paid. However, in *Beachlawn Bldg. Corp. v. City of St. Clair Shores*,[11] the validity of charges for building permits was in question and the statutory section did not provide a protest procedure. Since defendant city refused to accept any payment under protest, the plaintiff paid in full without formal protest, subsequently bringing suit to recover the alleged overcharges. Justice Dethmers held that this procedure was proper since the evidence established that the payments were involuntary. The court stressed the fact that the payments were involuntary because the builder could not safely proceed without first obtaining the permits in question.

II

PROBLEMS OF PUBLIC POLICY

Twice during the period covered by this Survey, the court was required to decide whether enforcement of an otherwise valid contract was to be denied because of certain public policy considerations. Opposite conclusions were reached in the two cases.

In re Muxlow Estate[12] involved the claim by a wife through her administratrix to a share of her deceased husband's estate. An antenuptial agreement was invoked to bar the wife's claim and thus drew in question the validity of the pact. The wife's administratrix argued that the contract tended to facilitate or condone separation or divorce and therefore violated public policy. The reasoning behind Justice Souris' rejection of this argument appears in one paragraph of the opinion:

> The second and the fourth paragraphs of the foregoing agreement are the ones relied upon by appellant to establish the claim that it was entered into in contemplation of a future separation. The second paragraph, it is true, recites that the intention of the parties was to provide for disclaimer by each of any interest in the property of the other upon termination of the marital relation as well as upon death. Of controlling significance, however, is the fact that notwithstanding the express desire of the parties, the agreement contains mutual disclaimers effective only upon death. Whatever may be said concerning the desire and motives of the parties at the time of execution of the agreement, the fact remains there is no language in the agreement which effectively barred either party from claiming an interest in the property of the other had their marital relation terminated prior to the death of one of the parties.[13]

10. Mich. Comp. Laws § 211.53 (1948), Mich. Stat. Ann. § 7.97 (1960).
11. 370 Mich. 128, 121 N.W.2d 427 (1963).
12. 367 Mich. 133, 116 N.W.2d 43 (1962).
13. Id. at 136, 116 N.W.2d at 45.

Although the test is clear, correct application of it in this case would seem to call for a contrary result. The paragraph to which Justice Souris directed his attention called for the release of,

> . . . any and all claims of any kind and nature in and to the property, both real and personal, of the other party *which includes any claim of dower or curtesy and any right or claim which might accrue to them upon the death of the other by virtue of any law. . . .*[14] (Emphasis supplied.)

Apparently the court wished to adopt the position that the claims referred to in the italicized portion of the last quoted language limited the scope of the term "all claims" immediately preceding it. This construction is hard to accept on its face. It becomes even more implausible when we remember that immediately preceding and following the quoted language the parties made it clear that they wished to have the agreement operative upon the termination of the marriage relationship even when the cause was one other than death.

In the second case concerning public policy, *Groening v. Nowlen*,[15] the plaintiff sought cancellation of a deed given as security for repayment of money misappropriated from his employer. His argument was that the deed was invalid because given in consideration of the defendant's promise not to prosecute. The trial court set aside the deed and ordered a reconveyance of the premises. At the same time the plaintiff was ordered to account to the defendant for the misappropriated funds.

On appeal defendant argued that the 1932 decision of the court in *Wilhelm v. King Auto Fin. Co.*[16] sanctioned the practice in question and repudiated earlier cases supporting the action of the trial court in the instant case. Chief Justice Carr, speaking for a unanimous court, rejected this contention and stated concerning the *Wilhelm* case: "Had it been intended to modify the general rule asserted in Buck v. First National Bank of Paw Paw we have no doubt that such intention would have been clearly expressed."[17]

A reading of the *Wilhelm* opinion discloses language[18] which

14. Id. at 135, 116 N.W.2d at 45.
15. 369 Mich. 28, 118 N.W.2d 998 (1963).
16. 259 Mich. 463, 244 N.W. 130 (1932).
17. Supra note 15, at 34, 118 N.W.2d at 1001.
18. Justice North, who wrote the majority opinion, quoted with approval the following language from the lower court's opinion:

> The court is of the opinion that the transaction in question is not subject to being voided for the reason that the defendants' mortgage was obtained by duress. There does not seem to the court to have been any bad faith in what was done with relation to Wilhelm. He undoubtedly was guilty, and he and his family undoubtedly sought to make restitution with a view to having the proceedings dropped. The acceptance of restitution was in no sense improper, and no fraud

certainly appears to support the conveyance in the instant case. Nevertheless, it is also clear that the current court wishes to limit the effect of *Wilhelm* to its particular facts and will not follow it. It should also be noted that the decision in the instant case merely deprives defendant of his security for repayment of the debt. The basic obligation to repay the misappropriated funds remains intact.

III

PROBLEMS OF INTERPRETATION

The Survey period produced two decisions on interpretation of contracts. The first opinion by Justice Kelly reflects a sensible, realistic approach to a difficult problem. The second opinion by Justice Black unfortunately illustrates an unrealistic approach to an equally troublesome question.

Assignments. In 1952, plaintiff in *Cinderella Theatre Co. v. United Detroit Theatres, Corp.*[19] entered into a fifteen year lease of a theatre with defendant-lessee. In 1958, after the theatre had operated at a loss for six years, the defendant decided to avail itself of an alleged right to terminate the lease and its liability through an assignment to a third person. In this respect, article 14 of the lease provided:

> It is further expressly understood and agreed that no assignment or conveyance of this lease of the leasehold estate hereby created may be made by the lessee unless and until the lessee shall have first deposited with the lessor as advance rent the further sum of $39,333, which said deposit shall be applied to the payment of the rental accruing under this lease during the last 12 months of the 15th year of the term hereof, and unless the assignee shall assume and agree to perform all of the covenants and conditions of this lease on the part of the lessee to be performed. Upon said additional deposit in this article provided for being made, and notice given by the lessee to the lessor of such assignment accompanied by a copy of the document of assignment and assumption, the lessee, United Detroit Theatres Corporation, shall automatically be relieved and released from each and every of the covenants in this lease contained.
>
> It is further expressly understood and agreed that if and in the event, after said additional deposit of $39,333 provided for in this article is made, this lease be terminated by the lessor by reason of

or deceit was practiced upon the court or upon court officials. The judge and the prosecutor both knew what had been done. If, in their judgment, it was proper to drop the proceedings, the public has been protected, as far as the law contemplates. If the law were as contended for by the plaintiff, it would be impossible for any injured and defrauded plaintiff to make a settlement which could not be subsequently repudiated in a proceeding like this. I do not believe that justice demands such a rule.

259 Mich. at 468, 244 N.W. at 131.

19. 367 Mich. 424, 116 N.W.2d 825 (1962).

> default on the part of the lessee or its assignee in the payment of the rental hereinabove reserved and agreed to be paid, or by reason of the default of the lessee or its assignee in the observance or performance of any other covenant or condition of this lease on the part of the lessee or its assignee, then and in such event said sum of $39,333 deposited with the lessor pursuant to the provisions of this article shall also belong to and be kept and retained by the lessor free and discharged of any and all claims, rights or interest of the lessee and its assignee therein and thereto and as and for liquidated damages of the lessor occasioned by such default on the part of the lessee or its assignee.[20]

The prescribed procedure was followed by defendant and this action was subsequently commenced by plaintiff to set aside the assignment and hold defendant responsible for rent payments accruing after the date of the assignment. The Supreme Court of Michigan affirmed the action of Circuit Judge Horace W. Gilmore in granting the relief requested by plaintiff.

In reaching this result, the court took a position contrary to that assumed by three other courts which have been confronted by similar problems. The Supreme Courts of Kentucky[21] and Idaho,[22] and the United States Court of Appeals for the Fifth Circuit[23] in similar cases have all permitted a lessee to escape further liability by assigning his interest. As Corbin has stated, "these cases look suspiciously like those in which a 'joker' is included in the terms of the contract (no 'joke' to the unwary obligee)."[24] However, removal of the "joker" from the deck is not without its difficulties.

One approach would be to adopt the position that there is an implied promise to assign only to a financially responsible assignee. There are several difficulties with this theory, however. First, in Michigan there is a statute[25] prohibiting the implication of covenants in certain cases. Second, the policy of requiring financially responsible assignees would involve second-guessing the assignor's judgment at a much later date. Finally, it appears that no reasonable interpretation of the contract clause in question can lead to the conclusion that a financially responsible lessee is necessary in all cases, and it appears from a reading of the opinion in the *Cinderella* case that the court did not take this approach.

The court in the instant case adopted the alternative of insisting that the assignor act in good faith. The evidence showed that the

20. Id. at 427, 116 N.W.2d at 826-27.
21. Alexander v. Theatre Realty Corp., 253 Ky. 674, 70 S.W.2d 380 (1934).
22. J. R. Simplot Co. v. Chambers, 82 Idaho 104, 350 P.2d 211 (1960).
23. Ramey v. Koons, 230 F.2d 802 (5th Cir. 1956).
24. 4 Corbin, Contracts § 866 n.39 (Supp. 1962).
25. Mich. Comp. Laws § 565.5 (1948), Mich. Stat. Ann. § 26.524 (1953).

assignee was wholly owned and controlled by the assignor. As Judge Gilmore stated: "I can not conceive of [the assignee] being anything but the tool, instrumentality and agency of the parent and it is my opinion that is not what was intended by the writers of article 14. . . ."[26]

An examination of the three similar cases outside Michigan discloses that, in two of them,[27] there was little evidence of bad faith surrounding the transaction. The third case[28] can be distinguished on the ground that, although the assignor may have acted in bad faith, there was a substantial period of time in which the lessor failed to object. This was not the situation in the instant case.

The decision in *Cinderella* should not be read as an indication that the court will always be willing to remove the "joker." A clause permitting assignment and concurrent release from liability is undesirable for the lessor since it can often operate as advance consent to a novation. If the lessor cannot insist that the assignor's liability will continue even after the assignment, then prudence dictates that an attempt be made to insure that the assignee will be acceptable by describing the class of persons or corporations to which a valid assignment may be made. Absent this, the decision in the instant case is welcome because it indicates that the court is well aware that commercial contracts must rest upon a foundation of good faith and practice in the performance of duties and in the exercise of rights. Here the court properly frustrated the defendant's attempt to have its cake and eat it too.[29]

---

26. Quoted by the court. Supra note 19, at 429, 116 N.W.2d at 827.

27. Alexander v. Theatre Realty Corp., supra note 21; Ramey v. Koons, supra note 23.

28. J. R. Simplot Co. v. Chambers, supra note 22.

29. The following facts from the record appear in the opinion of the court:

(1) Prior to November 8, 1958, Pontiac not only agreed to accept the assignment of the lease but also entered into an oral management agreement with the UDT, by the terms of which UDT was to supervise the buying and booking of films at the Cinderella, was to handle finances, advertising, maintenance, and take care of accounting and auditing;

(2) The assignment in question was executed on behalf of Pontiac and UDT by Mr. Harold Brown and Mr. E. J. Welling who held identical positions in both corporations. The instructions that Mr. E. J. Welling received with respect to the assignment as an officer of UDT in no way differed from the instructions he received with respect to the assignment as an officer of Pontiac;

(3) From the date of assignment until the date of trial, no salaries were paid by Pontiac to any of its officers;

(4) Films which are exhibited in the Cinderella Theatre are booked and purchased by Mr. Thomas Beyerly who is an employee of UDT, and is paid by UDT and not by Pontiac. All contracts entered into by the Cinderella Theatre are signed by Woodrow Praught, President of both UDT and Pontiac. However, Mr. Praught receives no salary from Pontiac;

(5) Price-Waterhouse performs auditing services for the Cinderella Theatre and is paid therefore by UDT, not Pontiac;

Releases of Liability. An equally difficult case which came before this court during the last year was *Hall v. Strom Constr. Co.*[30] Unfortunately, the case did not receive the common sense treatment afforded the one just discussed and presumably the court will be forced to return again to the same problem.

The plaintiff here was injured in an accident. He settled with defendant's insurance company and signed a release. At the time the release was executed, all parties concerned assumed that he had only suffered a concussion and back injuries. There was no question of fraud or misrepresentation. Subsequently, plaintiff discovered that he was suffering from epilepsy traceable to the accident. Both the trial judge and supreme court agreed that the release should be set aside on the basis of mutual mistake.

Cases concerning the validity of such releases have been plaguing the courts for years and Justice Black referred in his opinion to a recent and lengthy A.L.R. annotation on the topic.[31] Certainly most of the release cases are hard ones. On the one hand stands the injured man who has compromised his claim for what often turns out to be a pittance. On the other hand stands the insurance company in possession of a release which it obtained in good faith. Courts have struggled to give relief to the injured party while rationalizing the result within the traditional framework of contract law. Slowly, however, it has been realized that this may be an unobtainable goal and that release cases may be in a class by themselves.[32]

The argument against judicial interference with contractual advantage is that security of business transactions is thereby promoted and such security is desirable because it protects the reliance of businessmen.[33] This argument has not been effective in the case of releases because the vitally interested party, the insurance company, has not been able to present a convincing plea that in the ordinary case it has changed its position in reliance upon the release. Nevertheless,

(6) Nearly 1 year after the assignment, in October of 1959, the stationery of UDT still listed the Cinderella as 1 of its theatres. In addition, UDT listed the Cinderella Theatre as one of its theatres in gift books sold to the public, and the uniforms of the ushers of the Cinderella Theatre in April of 1961 bore the insignia 'U.D.T.';

(7) In a press release prepared by UDT and submitted to the Detroit newspapers in February of 1959 when Mr. Praught was appointed President of UDT, the Cinderella was listed as a UDT theatre.

367 Mich. at 434-35, 116 N.W.2d at 830.

30. 368 Mich. 253, 118 N.W.2d 281 (1962).

31. Annot., 71 A.L.R.2d 82 (1960).

32. See the concurring opinion of Judge Frank in Ricketts v. Pennsylvania R.R., 153 F.2d 757, 767 (2d Cir. 1946).

33. Counsel for defendant unsuccessfully advanced this argument. See supra note 30, at 260, 118 N.W.2d at 285.

courts have hesitated to acknowledge this. Instead they have paid lip service to the principle of security of transactions, and then have set aside the release on the particular facts. For example, in this particular case Justice Black stated: "Thus may the 'modern trend' of authority be now applied without unduly affecting the *valued right of contract* by which out-of-court settlements, of claims for personal injuries, are fairly and understandingly negotiated and effectively completed."[34] (Emphasis supplied.)

To accomplish such a result the court resorted to a distinction in the well-worn law of mutual mistake. According to Justice Black the release may be set aside when ". . . the releasor's proof persuasively shows a fair and mutual want of knowledge of a hidden injury which eventually comes to consequential light, distinguished from a then want of knowledge of unexpected adverse consequences of a known yet apparently negligible injury."[35] The crucial issue is then said to be whether or not Hall knew of the brain injury.

With all due respect for the court, it appears that this is a meaningless verbal distinction, although one that enjoys some popularity.[36] In the instant case the characterization of the brain damage as injury instead of consequence solves the problem and renders the suggested legal principle of no analytical value. Hall suffered a blow on the head and a brain concussion. The court says the subsequent epilepsy was caused by an unknown injury and therefore not covered by the release. But why was it not a subsequent consequence of a known injury and therefore covered by the release? Is the court committed to the position that a disabling scalp infection incident to the blow on the head would be covered by the release? Only the future can tell but scepticism is justified.

The opinion in this case illustrates dramatically the pitfalls which await a court trying to reach a correct result while adhering to traditional doctrine. The decision in the *Hall* case refuses to extend the security of business transaction rationale where it apparently is unnecessary. There is no criticism of this aspect of the case. However, the benefits of an essentially pragmatic approach to a particular set of facts are somewhat dissipated by the court's reliance upon a formula which disguises the true issue. Attorneys are now invited to litigate the hidden injury—consequence issue, when the real problem is one of fairness. It is regrettable that the court could not or would not articulate the basic policies underlying its decision.

34. Id. at 254-55, 118 N.W.2d at 282.
35. Id. at 258, 118 N.W.2d at 284.
36. See the discussion and cases cited in 6 Corbin, Contracts § 1292 (Supp. 1962).

Application for Insurance. In *Merrill v. Fidelity Cas. Co.*,[37] the United States Court of Appeals for the Sixth Circuit denied a claim based upon a life insurance policy sold through a vending machine at the Flint, Michigan, airport. The application was not personally signed by the insured as required by its terms but was executed by the insured's father who was one of the beneficiaries. The court found the condition clear and unambiguous and refused to inquire into the reasonableness of the condition. Although two different courts are involved, the contrast with Justice Black's opinion in *Hall* is marked. There clear language was disregarded,[38] here it was respected. The court in the *Merrill* case disclaimed the necessity for appraising the justification of the language used.[39] However, it is still possible to wonder whether the varying approaches illustrated by the two cases does not in fact spring from a judgment as to the need for the protection sought by the insurance company in the respective cases.

IV

WARRANTY LIABILITY

This year the sales cases which would traditionally be grouped in a separate article appear here under one topic heading. As in the past there has been some discussion of privity as a defense to breach of warranty. In last year's Survey article there was some speculation as to whether the decision in *Spence v. Three Rivers Builders & Masonry Supply, Inc.*[40] marked the end of privity as a defense in Michigan.[41] There have been no opinions by the Michigan Supreme Court on this subject during the past year. However, the Sixth Circuit[42] and Judge Levet in the Southern District of New York[43] have both indicated that they read the *Spence* opinion as abolishing the defense of privity in Michigan.

The final case, *Barefield v. La Salle Coca-Cola Bottling Co.*,[44] was an appeal by the plaintiff from an adverse jury finding in a warranty

37. 304 F.2d 27 (6th Cir. 1962).

38. The release in the Hall case covered ". . . all known and unknown personal injuries. . . ." Hall v. Strom Constr. Co., supra note 30. Brief for Appellants p. 5.

39. ". . . [S]ince the condition is clear and unambiguous . . . it is unnecessary to pass upon the question whether it is reasonable or unreasonable, as the parties are bound by the clearly expressed and clearly understood conditions of their contract and, in such case, no factual question remains for the determination of a jury." 304 F.2d at 29.

40. 353 Mich. 120, 90 N.W.2d 873 (1958).

41. Boshkoff, Sales and Secured Transactions, 1962 Survey of Mich. Law, 9 Wayne L. Rev. 181, 181-83.

42. Schultz v. Tecumseh Prods., 310 F.2d 426, 429 (6th Cir. 1962) (dictum).

43. Conlon v. Republic Aviation Corp., 204 F. Supp. 865 (S.D.N.Y. 1960).

44. 370 Mich. 1, 120 N.W.2d 786 (1963).

action. Her claim was based upon the alleged presence of ground glass in a bottle of Coca-Cola. Evidence was offered by the defendant to establish that she continued to drink the beverage after tasting something that should have warned her that it was defective. The trial judge's instruction on this point mentioned "assumption of risk," and plaintiff argued that is was incorrect to use tort concepts in a warranty action. The court affirmed the verdict for defendant although admitting that it was inaccurate to talk about assumption of risk. There was, nevertheless, an issue as to whether plaintiff had used the product in disregard of a known danger and the instruction given stated the essence of an available defense.